

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

**CG4, LLC, d/b/a
CHEF GEOFF’S-TYSONS CORNER, *et al.***

Plaintiffs,

v.

**TRAVIS HILL, *et al.*,
Defendants.**

Civil Action No. 1:18-cv-360-AJT/IDD

**MEMORANDUM IN SUPPORT OF DEFENDANTS’
MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Chamica Adams, a 23-year-old Maryland resident, attended a \$10 open-bar happy hour at a popular bar in Washington DC, on a Wednesday evening. After having multiple drinks, Chamica left the bar around 8:30 p.m. to go home. Despite arranging for a designated driver for the evening, Chamica attempted to drive home. At the same time, Julia Bachleitner, a graduate student at Johns Hopkins University, was waiting to cross the street with her friend and classmate, Melissa Basque. Chamica hit Julia and Melissa, throwing both women into the air. Melissa suffered severe injuries. Julia died. (Zurawski Decl. ¶ 2, Ex. A.) Tragic traffic accidents resulting from happy-hour drinking are not isolated events. In fact, several states ban happy hours to prevent people from over-indulging on discounted alcoholic beverages and the negative consequences that follow. Such tragedies and threats to public safety are what the Virginia laws and regulations at issue in this case are intended to prevent.

Alcohol is a commodity that provides lucrative business opportunities, but also directly implicates public health and safety concerns. Because of these competing interests, Virginia employs a comprehensive regulatory scheme to temper alcohol sales and consumption while also allowing revenue to be raised for the benefit of all Virginians. Within that scheme, the General Assembly enacted Va. Code § 4.1-111(B)(15), directing the Virginia Alcoholic Beverage Control Authority (“ABC”) to promulgate regulations that “[p]rescribe the terms for any ‘happy hour’ conducted by on-premises licensees . . . but prohibit the advertising of any pricing related to such happy hour.” ABC subsequently enacted regulations that prohibit a retail licensee from “[s]elling two or more drinks for one price, such as ‘two for one’ or ‘three for one.’” 3 Va. Admin. Code § 5-50-160(B)(4). ABC also adopted regulations, which apply only to paid advertisements, limiting how happy hour may be advertised outside of licensed premises. These

regulations allow licensees to “use the term ‘Happy Hour’ or ‘Drink Specials,’” share “a list of the alcoholic beverage products featured during a happy hour,” and provide “the time period within which alcoholic beverages are being sold at reduced prices.” 3 Va. Admin. Code § 5-50-160(B)(8). Thus, the narrow regulations allow licensees ample opportunities to promote drink specials, while simply prohibiting the terms and conduct that are most likely to induce overconsumption in a happy hour setting.

Because the challenged law and regulations comport with the First Amendment restrictions for commercial speech, the ABC Defendants are entitled to summary judgment. The Commonwealth has a substantial government interest in limiting promotions associated with discounted alcoholic beverages during happy hour, which may result in binge drinking, drinking and driving, and other harmful personal and public-health consequences. The advertising restrictions directly advance this interest, which Defendants support with ample and undisputed evidence. And given the limited interference that the regulations make upon speech, the regulations are constitutionally acceptable—i.e., the regulations are narrowly drawn and licensees may publicize information about happy hour timing, location, drink types, drink brands, and combined food and drink specials, all of which is useful and objectively verifiable information for consumers.

Without any supporting evidence, Plaintiffs seek to dismantle ABC’s regulatory scheme and a Virginia statute by bringing as-applied and facial First Amendment challenges to 3 Va. Admin. Code §§ 5-50-160(B)(4), (8), and Va. Code § 4.1-111(B)(15). Plaintiffs complain that they cannot communicate effectively about happy hours and that the regulations prevent them from using festive terms to attract customers. But there are a myriad ways that Plaintiffs may describe happy hour and drink specials through paid advertisements on television, print, radio,

billboards, or other modes of signage. Indeed, Plaintiffs may market within their premises and via unpaid advertising, such as on social media, without restriction. Thus, the only real restriction that Plaintiffs have is that they cannot offer two or more alcoholic beverages for one price – a marketing scheme that encourages overconsumption by increasing the alcohol received from a single transaction. And although Plaintiffs have filed a lawsuit challenging the two-for-one discount ban, Plaintiff Tracy stated that he has never even considered offering the discount any of his restaurants, including his restaurants that are not subject the Virginia ban. (Zurawski Decl. ¶ 3, Ex. B at 79:11-18.)

Moreover, Plaintiffs have made no efforts to empirically demonstrate any realized flaw with the regulations, such as through financial or sales data. Plaintiffs' only real complaint is that licensees may not say whatever they want to advertise discounted alcohol without any regard for the corresponding public safety implications.

Yet, these public health and safety concerns matter and justify the proportional restrictions in place. ABC does not ban happy hours or happy hour advertising. Rather, ABC enacted measured commercial speech restrictions in accordance with the First Amendment. Accordingly, this Court should grant summary judgment in favor of Defendants.

STATEMENT OF UNDISPUTED FACTS

The following facts are undisputed and are demonstrated by the cited pleadings and exhibits, which are appended to the Declarations of Chris Curtis, Derek Reed, Ph.D., and Tara Zurawski.

I. ABC's Mission and Regulatory Framework

1. The General Assembly created ABC in 1934 to control alcohol. (Curtis Decl. ¶ 4.)

2. ABC has the “power to prescribe and enforce regulations and conditions under which alcoholic beverages are possessed, sold, transported, distributed, and delivered, so as to prevent any corrupt, incompetent, dishonest, or unprincipled practices and to promote the health, safety, welfare, convenience, and prosperity of the people of the Commonwealth.” Va. Code Ann. § 4.1-101(A) (2018).

3. ABC’s mission is to “generate a reliable stream of revenue for Virginia and promote public safety through the responsible sale and regulation of alcoholic beverages.” (Curtis Decl. ¶ 4, Ex. A.)

4. ABC has contributed more than \$9.9 billion to the general fund since 1934 to support state services, including substance abuse and treatment. (*Id.* ¶ 6, Ex. A.)

5. Alcohol consumption is associated with many health and safety issues, including: unintentional injuries such as car crashes, falls, burns, and alcohol poisoning; violence including homicide, suicide, intimate partner violence, and sexual assault; and other health issues, including fetal alcohol spectrum disorders, alcohol dependence, and memory and learning problems. (*Id.* ¶ 9, Ex. D, E, F.)

6. Fatal drunk driving accidents are more likely to occur late at night and around 7 p.m., when happy hour specials typically end and people drive home. (*Id.* ¶ 37(c), Ex. T.)

7. Discounted alcoholic beverages are enticing to a price-sensitive population. (Zurawski Decl. ¶ 3, Ex. B at 112.)

8. Banning certain advertisements related to alcohol and increasing the price of alcohol help to significantly reduce alcohol abuse. (Reed Decl. ¶ 2, Ex. A at ¶¶ 32, 40, 42.)

9. ABC has undertaken many steps to reduce the overconsumption of alcoholic beverages and reduce alcohol-related injuries. (Curtis Decl. ¶¶ 14-17, Ex. C, J.)

10. Those steps include, but are not limited to, prohibiting people under 21 years of age from drinking, requiring a certain ratio of food sales with alcohol purchases at restaurants serving alcohol, enacting educational programs regarding substance abuse or preventing alcohol abuse, implementing enforcement procedures and actions, limiting alcohol advertising near schools and playgrounds, regulating alcoholic beverage labels, preventing patrons from having more than two drinks per person (with the exception of small flights of beer or wine), prohibiting licensees from compensating employees based on the volume of alcohol sold, imposing liability on licensees who over serve alcohol to customers, preventing interdicted persons from obtaining alcohol, and prohibiting licensees from giving away free alcohol.¹ (*Id.* ¶ 16.)

II. ABC's Regulation of Happy Hour Advertising

11. ABC regulates happy hour, which is defined as “a specified period of time during which alcoholic beverages are sold at prices reduced from the customary price established by a retail licensee.” 3 Va. Admin. Code § 5-50-160(A).

12. ABC regulates happy-hour advertising to prevent licensees from offering the cheapest alcoholic beverages in competition with other establishments, leading to “a race to the very

¹ Va. Code Ann. § 4.1-103.02 (ABC must administer a substance abuse prevention program); Va. Code Ann. § 4.1-202 (licensees may be held liable for any violation of statutes or any Board regulation); Va. Code Ann. § 4.1-210 (food sales must account for 45 percent of licensee gross receipts from the sale of mixed beverages and food); Va. Code Ann. § 4.1-306 (setting forth minimum drinking age); 3 Va. Admin. Code § 5-10-10 (hearing procedures and disciplinary proceedings); 3 Va. Admin. Code § 5-20-40 (prohibiting advertising alcoholic beverages in publications distributed primarily to a high school or younger age level); 3 Va. Admin. Code § 5-20-100 (prohibiting alcoholic beverage advertising or sponsorship on a college, high school or younger age level); 3 Va. Admin. Code § 5-50-10 (prohibiting alcohol sales to minors, intoxicated or interdicted persons); 3 Va. Admin. Code § 5-50-110(A)(5) (describing meal requirements); 3 Va. Admin. Code § 5-50-160(B)(2) (prohibiting possession of more than two drinks at one time); 3 Va. Admin. Code § 5-50-210 (prohibiting compensation based upon the volume of alcoholic beverages sales); 3 Va. Admin. Code § 5-70-90 (describing annual report licensee must submit to ABC that includes food and alcohol sales receipts); 3 Va. Admin. Code § 5-50-160(B)(6) (licensees may not give away free drinks); 3 Va. Admin. Code § 5-40-10 (labels); 3 Va. Admin. Code § 5-50-60(G) (sangria labels).

lowest prices available for alcoholic beverages.” (Curtis Decl. ¶¶ 28-30; Zurawski Decl., ¶ 4 Ex. C at 29: 6-7, 17-19.)

13. Before 2014, ABC prohibited licensees from advertising happy hour outside of a licensed establishment. (Curtis Decl. ¶ 11, Ex. G.)

14. In 2012, ABC permitted happy-hour advertising for the first time. (*Id.* ¶ 12, Ex. H.)

15. In response to the proposed regulatory changes, ABC received public comments that suggested the regulations should “[o]utlaw happy hour promotions,” “[e]liminate happy hour or maintain current restrictions,” “[l]imit size of flavored malt beverages,” “[p]rohibit bartenders from mixing energy drinks with alcoholic beverages,” and prohibit “Happy Hour advertising . . . in any form.” (*Id.* ¶ 13, Ex. H.)

16. ABC sought to “balance the various responses and input that [ABC received] from the public.” (Zurawski Decl., ¶ 4 Ex. C at 35:19-20.) “[B]ased on that feedback during the regulatory process, [ABC] recognized that these businesses were engaged in the lawful activity of selling alcoholic beverages, and they should be able to tell the public if they’re having reduced prices.” (*Id.* at 36: 1-4.)

17. After performing a comprehensive regulatory review, which focused on balancing public safety with business-friendly accommodations, ABC amended the happy-hour advertising regulations to allow restaurants to convey messages about happy hour “without a total ban on any type of advertising.” (*Id.* at 36:24–37:1.)

18. The advertising restrictions do not apply to happy-hour promotions that are free to licensees. Posting happy hour advertisements on a Facebook, Instagram, or Twitter account belonging to the licensee is an example of lawful happy hour advertising as long as the licensee

does not pay an individual or company to promote the licensee's social media presence. (Curtis Decl. ¶¶ 20-22, 34-36.)

19. Licensees may always advertise regular drink prices. (*Id.* ¶ 25(a).)

20. Licensees may also advertise a specific alcoholic beverage and its price so long as the price is always the same and manufacturer or wholesaler money is not involved in the drink promotion—e.g., “Introducing our new drink, The Pilot, featuring Bacardi Limon rum. Only \$7.” (*Id.* ¶ 25(b), Ex. G.)

21. Licensees may also advertise food and drink packages without restriction. E.g., “20 wings and pitcher of Bud Light for \$15.99, from 5 to 7p.m.” is permissible. (*Id.* ¶ 25(c), Ex. G.)

22. Licensees may advertise happy-hour prices and use descriptive terms within the licensed premises. For example, licensees may post a sign in a window, on a wall, in the bathroom, or on a door with detailed happy hour information, including price or refer to happy hour in festive terms, such as “Wine Down Wednesday,” as well as display happy-hour menus without restriction. In addition, licensees may tell customers in person and over the phone about happy-hour prices. (*Id.* ¶ 25(d).)

23. Licensees may always advertise the time and location of certain drink specials or happy hours. (*Id.* ¶ 25(e).)

24. Happy-hour advertisements such as these are permitted:



(*Id.* ¶ 25(f), Ex. K.)

25. Licensees may not pay to advertise specific prices or refer to “discounts,” 3 Va. Admin. Code § 5-50-160(B)(8), but these limitations do not apply to unpaid advertisements, such as posts on social media. (*Id.* ¶ 20-21.)

26. Licensees may not offer unlimited beverages for a set price or two-for-one drink specials. (*Id.* ¶ 31.)

III. Price Advertising is Tied To On-Premises Overconsumption

27. Derek Reed, Ph.D., is a professor at the University of Kansas where he directs the Applied Behavioral Economics Laboratory and studies consumer decisions related to substance abuse, including alcohol. (Reed Decl. ¶ 1, Ex. A.)

28. Dr. Reed administered a clinical study that showed alcohol consumption in a happy-hour setting is price-sensitive, meaning alcohol demand increased when the price decreased. (*Id.* Decl. ¶ 3, Ex. A.)

29. Dr. Reed concluded that Virginia’s regulations restricting advertising happy-hour price advertising “reduces levels of consumption by limiting price fluctuation in advertising; [as] such competition in advertising could push the market to reduce prices to low values associated with excessive demand and consumption.” (*Id.* ¶ 4, Ex. A. ¶ 9.)

IV. Price Framing Leads To On-Premises Overconsumption

30. “Price framing” or “promotional framing” means pricing goods in such a way that creates an economic incentive for consumers to purchase products. “Buy one get one free” (“BOGO”) sales are an example of price or promotional framing.” (*Id.*, ¶ 2, Ex. A at 2-3; Zurawski Decl., ¶ 5, Ex. D at 42-46, 70.)

31. Dr. Reed studied the effect of price framing on consumption patterns and the relative effect of a BOGO alcohol discount as compared to a “half-off” discount in a happy-hour setting.

(Reed Decl. ¶ 4, Ex. A. ¶ 31.)

32. The study showed that BOGO discounts resulted in significantly higher alcohol consumption rates than half-off discounts. (*Id.* ¶ 4, Ex. A. ¶ 34.)

33. Dr. Reed opined that prohibiting BOGO drink specials directly serves ABC’s interest in preventing over-consumption during happy hour. (*Id.* ¶ 4, Ex. A. ¶ 40)

V. Plaintiffs challenge the Happy Hour Advertising Statute and Regulations

34. Plaintiff Geoff Tracy co-owns and runs the day-to-day operations of several restaurants in northern Virginia, Washington, DC, and Maryland, including Chef Geoff’s-Tyson’s in Tyson’s Corner, Virginia. (Dkt. No. 9 ¶ 2; Zurawski Decl. ¶ 3, Ex. B at 15:21-16:24.)

35. Plaintiff CG4, LLC does business as Chef Geoff’s-Tyson’s Corner. (Dkt. No. 9, ¶ 9.)

36. Chef Geoff’s-Tyson’s offers happy hour on Wednesdays through Sundays from 3pm to 7pm and all day—from 11am to 9pm—on Mondays and Tuesdays. (*Id.* ¶ 12.)

37. During happy hour, Plaintiffs offer discounted food and alcohol. (*Id.*)

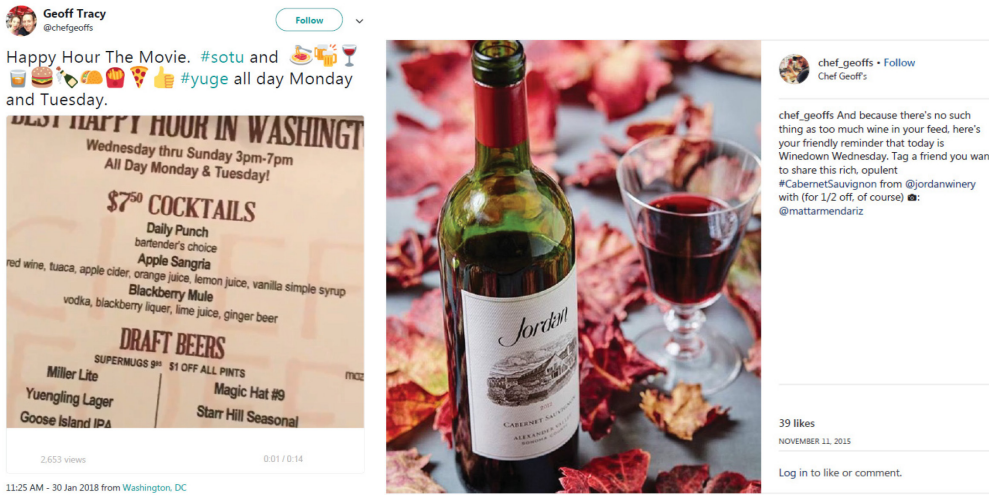
38. Plaintiffs claim that happy hours “bring in more customer traffic at non-peak times” and increase alcoholic beverage sales. (*Id.* ¶ 14; *see also* Zurawski Decl. ¶ 12, Ex. K.)

39. Plaintiffs look to pricing information at other restaurants when establishing their happy hour specials. (*Id.* ¶ 3, Ex. B at 46:22-47:10, 86:2-7.)

40. Plaintiffs advertise happy hour at Chef Geoff’s-Tyson’s on their website, where they post the happy-hour menu that includes pricing information, drink types, drink specials, and food offerings. (Dkt. No. 9 ¶¶ 3, 15-16.)

41. Plaintiffs also advertise happy hour at Chef Geoff's-Tyson's by posting on social media platforms such as Instagram, Twitter, and Facebook. (Zurawski Decl. ¶ 3, Ex. B at 66:22-25.)

For example, Plaintiffs have posted:



(Zurawski Decl. ¶ 6, Ex. E.)

42. Plaintiffs advertise happy hour at Chef Geoff's-Tyson's using the newspaper, e-mail, mail, signage, and by sharing the menu. (Dkt. Nos. 9 ¶¶ 3, 15-16.)

43. Plaintiffs also advertise happy hour at Chef Geoff's-Tyson's inside the restaurant by posting signs and sharing menus with specials and pricing. (*Id.* ¶¶ 3, 15-16.)

44. Plaintiffs bring as-applied and facial First Amendment challenges to Virginia's happy hour laws: 3 Va. Admin. Code 5-50-160(B)(4),² (8),³ and Va. Code § 4.1-111(B)(15).⁴

² 3 Va. Admin. Code § 5-50-160(B)(4) prohibits a retail licensee from "[s]elling two or more drinks for one price, such as 'two for one' or 'three for one.'"

³ 3 Va. Admin. Code § 5-50-160(B)(8) prohibits a retail licensee from "[a]dvertising happy hour anywhere other than within the interior of the licensed premises, except that a licensee may use the term 'Happy Hour' or 'Drink Specials,' a list of the alcoholic beverage products featured during a happy hour as well as the time period within which alcoholic beverages are being sold at reduced prices in any otherwise lawful advertisement."

⁴ Va. Code § 4.1-111(B)(15) directs the ABC Board to promulgate regulations that [p]rescribe the terms for any "happy hour" conducted by on-premises licensees . . . but prohibit the advertising of any pricing related to such happy hour."

45. According to Plaintiffs, the happy hour advertising regulations render a lawful happy hour advertisement “essentially. . . uninformative,” though Plaintiffs agreed that publicizing information about happy hour timing, location, drink types, and drink brands—practices that the law permits—is useful to consumers. (Dkt. No. 9, ¶ 3; Zurawski Decl. ¶ 3, Ex. B at 51:2-20.)

46. Plaintiffs complain that these regulations harm their speech rights, hurt their “ability to attract new customers and cost [them] precious foot traffic,” and inhibit them from competing with other businesses based on happy hour specials. (Dkt. No. 9, ¶ 26.)

47. Plaintiffs want to advertise happy hour discounts using “festive terms.” (*Id.* ¶ 27.)

48. Plaintiffs further claim that BOGO specials are functionally equivalent to half-price specials, a practice that ABC permits, and that the regulations prevent “establishments from offering a special in the most effective way.” (Dkt. No. 9 ¶ 48.)

49. Plaintiffs do not rely on any evidence to support the claims in their complaint. (Zurawski Decl. ¶¶ 7, Ex. F at 6:19-25; 8, Ex. G; 9, Ex. H.)⁵

50. Plaintiffs do not allege to suffer any financial harm as a result of 3 Va. Admin. Code 5-50-160(B)(4), (8), and Va. Code § 4.1-111(B)(15) or any other actions taken by ABC. (Dkt. No. 9, ¶¶ 40, 52; Zurawski Decl. ¶¶ 7, Ex. F; 10, Ex. I.)⁶

⁵ Plaintiffs produced no documents in response to Defendants’ RFP No. 1, which asked for “all documents which you assert support your claims and/or were used or referenced in preparation of the answers to the interrogatories propounded herein.” (Zurawski Decl. ¶¶ 7, Ex. F; 8, Ex. G.) In response to Defendants’ motion to compel, Plaintiffs stated that they had no documents. (*Id.* ¶ 7, Ex. F at 21.) At the hearing, Judge Davis made clear that Plaintiffs lack of production severely limits what they may rely on evidence at summary judgment. (*Id.* at 21.)

⁶ In order to defend against Plaintiffs’ as-applied challenges, Defendants sought Plaintiffs’ sales and inventory data to evaluate the specific harms alleged. ((Dkt. Nos. 44, 45, 61, 65, 66, 74, 80, 81, 84, 85, 87, 88) (granting Defendants’ discovery motions).) Plaintiffs refused to produce the data requested and Defendants moved to compel production and take related depositions. (Dkt. Nos. 65, 66.) Plaintiffs were ordered to produce this data from “at the very least” one Virginia, “one D.C. and one Maryland restaurant” that Tracy owns and submit to the depositions. (Zurawski Decl. ¶ 7, Ex. F at 21). Well after the close of discovery, Plaintiffs provided more than

51. Plaintiffs produced a report from Jon Nelson, Ph.D. that did not examine data related to on-premises alcohol consumption or happy hours. (Zurawski Decl. ¶ 11, Ex. J; Reed Decl. ¶ 5.)

52. Nelson did not address how promotional framing like BOGO sales impact alcohol consumption during happy hour. (Reed Decl. ¶ 6.)

53. Nelson stated that he used only “observational studies” of “public policies leading to lower alcohol prices and increased availability in several countries,” which “contrast sharply with the ‘experimental methods’” that Dr. Reed employed. (Zurawski Decl. ¶ 11, Ex. J at 2.)

54. Nelson studies reflect the long-run inelasticity of alcohol demand for all types of beer, wine, and spirits across a number of jurisdictions. Nelson focused on off-premises alcohol consumption, *i.e.*, drinking that does not occur during happy hour. (*Id.* ¶ 11, Ex. J at 4-6, 9-12.)

LEGAL STANDARD

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The party bearing the burden of proof on an issue at trial must designate “specific facts showing that there is a genuine issue for trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The mere existence of some alleged factual dispute between the parties does not defeat an otherwise properly supported motion for summary judgment. *Anderson v. Liberty Lobby*,

68,000 image files of sales and inventory data. Defendants had specifically requested data in Excel or native format. (*Id.* at 4, 21.) Plaintiffs did not produce this data in a useable format, rendering the data useless in the short timeframe it was produced. Plaintiffs directed Defendants to seek the native data from third parties. The Court granted leave for Defendants to serve the subpoenas. (Dkt. Nos. 80, 81, 87.) After lengthy discussions with the third parties, Defendants learned that the third parties did not have this data, never did, and that Plaintiffs never sought its timely production. (Zurawski Decl. ¶ 13, Ex. L.) To date, Plaintiffs have not produced this data. Defendants were forced to file numerous motions addressing these discovery disputes. (Dkt. Nos. 44, 45, 61, 65, 66, 74, 80, 81, 84, 85, 87, 88.) Defendants remain severely prejudiced at summary judgment without necessary and relevant discovery that should have been produced in light of the Court’s order.

Inc., 477 U.S. 242, 247-48 (1986). “It is the affirmative obligation of the trial judge to prevent factually unsupported claims and defenses from proceeding to trial.” *Bouchat v. Baltimore Ravens Football Club, Inc.*, 346 F.3d 514, 526 (4th Cir. 2003) (internal quotation marks and citation omitted).

At the summary-judgment stage, the Court must view the facts in the light most favorable to the non-moving party. *Liberty Lobby*, 477 U.S. at 255. “In reviewing cross motions for summary judgment, as in the immediate case, the Court must review each motion separately on its own merits to determine whether either of the parties deserves judgment as a matter of law.” *Moore-King v. Cty. of Chesterfield, Va.*, 819 F. Supp. 2d 604, 610 (E.D. Va. 2011), *aff’d*, 708 F.3d 560 (4th Cir. 2013) (internal quotation marks and citations omitted).

ARGUMENT

Defendants regulate numerous non-speech activities related to the sale and consumption of alcoholic beverages within the Commonwealth. The challenged regulations are merely a small part of a complex regulatory scheme that further ABC’s mission to generate revenue while acting in the interests of public safety, health, and welfare. The prohibition against advertising happy-hour prices is narrowly tailored to restrict the dissemination of discounted prices to the general population while allowing licensees the ability to creatively promote their discounts to targeted audiences. The prohibition against selling bundled, discounted alcoholic beverages restricts conduct, not speech. And, even if the Court were to construe this conduct as speech, the prohibition withstands scrutiny. The regulation limiting happy-hour advertisement descriptors applies only to noninformational advertising terms; as the regulation allows licensees to convey all of the objectively verifiable information that customers need. Because the challenged

regulations comport with the First Amendment restrictions for commercial speech, Defendants are entitled to summary judgment as a matter of law on Plaintiffs' facial and as-applied claims.

VI. Commercial-Speech Standard

"States clearly possess ample authority to ban the disclosure of alcohol content—subject, of course, to the same First Amendment restrictions that apply to the Federal Government." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486 (1995). Commercial speech is "expression related solely to the economic interests of the speaker and its audience." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980). Commercial speech is "usually defined as speech that does no more than propose a commercial transaction." *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001).

"While commercial speech is protected by the First Amendment, there is a commonsense distinction between commercial speech and other varieties of speech. Thus, the Constitution accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Educ. Media Co. at Va. Tech v. Insley*, 731 F.3d 291, 297 (4th Cir. 2013) (internal quotation marks, alterations, and citations omitted). Accordingly, a restriction on commercial speech must withstand intermediate scrutiny to survive a First Amendment challenge. *Id.* See also *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995) (applying intermediate scrutiny to commercial speech); *W. Va. Assn. of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 301 (4th Cir. 2009) (accord).⁷ Particularly because the standards and conduct of

⁷ More recently, the Supreme Court explained that "[t]he First Amendment requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) (internal quotation marks and citation omitted). "Heightened scrutiny" is not strict scrutiny. See *id.* at 572 (applying *Central Hudson* test). Because *Sorrell* applied *Central Hudson*, there is no reason to question the *Central Hudson* standard for commercial speech. See *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839, 849 (9th Cir. 2017) ("In commercial speech cases post-*Sorrell*, the

alcohol retailers and retail licensees “have traditionally been subject to extensive regulation by the States, it is all the more appropriate that [this Court] limits [its] scrutiny of state regulations to a level commensurate with the ‘subordinate position’ of commercial speech in the scale of First Amendment values.” *Fla. Bar*, 515 U.S. at 635. Defendants must produce evidence to support the regulations and restriction on speech. *Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (party seeking to uphold commercial speech restriction carries the burden of justifying it).⁸

VII. Prohibiting “two-for-one” sales does not burden speech.

At the outset, 3 Va. Admin. Code § 5-50-160(B)(4) does not trigger *Central Hudson* scrutiny because it regulates only non-expressive conduct. The regulation prohibits a licensee from offering bundled happy-hour discounts, such as “BOGO” sales, meaning the discount is conditional on a consumer receiving more than one drink in a single transaction. Regulating the type of discount that a licensee may offer at happy hour targets conduct, not speech.⁹

Second, Fourth, Sixth, and Eighth Circuits similarly have, at bottom, continued to apply *Central Hudson*.”).

⁸ As discussed during the hearing compelling Plaintiffs to produce sales and financial data, the data would have provided further empirical evidence showing how happy hours result in increased on-premises drinking within a short period of time and how customers order additional drinks shortly before happy hour ends, which goes directly to the second and third prongs of *Central Hudson*. The cross-jurisdictional information would have also allowed Defendants to compare happy hour sales at restaurants in and outside of Virginia belonging to Plaintiffs. The sales data is relevant to both the third and fourth prong of *Central Hudson*. Plaintiffs did not produce this information in any usable format as ordered by the Court, nor did they identify the proper custodians of the data when Defendants served third party subpoenas in an effort to acquire the information. As a result, Defendants are forced “into a fencing match without a sword or mask” and this severely prejudice Defendants at this stage. *McCray v. Md. Dep’t of Transp., Md. Transit Admin.*, 741 F.3d 480, 483 (4th Cir. 2014) (discussing Fed. R. Civ. P. 56(d) discovery and summary judgment requirements).

⁹ Plaintiffs maintain that the regulation is a content-based speech restriction because the purchase of two half-off drinks is functionally equivalent to a two-for-one discount. But the value of a half-off deal is realized after the purchase of a single alcoholic drink, whereas a bundled deal has no value unless a customer receives *two drinks or more*. Therefore, a bundled drink deal encourages more drinking during happy hour. ABC has accordingly prohibited that sales practice, and Plaintiffs’ First Amendment claims as to that regulation must fail.

Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1150-51 (2017) (explaining that price regulation targets conduct and does not implicate First Amendment). And “[i]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language.” *Id.* at 1151 (internal quotations omitted). Moreover, bundled-alcohol discounts are prohibited in Virginia, so advertising such discounts is illegal. *Central Hudson*, 447 U.S. at 566 (government may ban commercial speech related to illegal activity). Because 3 Va. Admin. Code § 5-50-160(B)(4) regulates non-expressive conduct, Plaintiffs’ challenges as to it must fail. Even if the Court were to deem this conduct as speech, the challenge to it fails for the reasons below.

VIII. *Central Hudson* Framework

When a regulation limiting commercial speech is challenged on First Amendment grounds, four criteria must be satisfied for the restriction to survive. *Cent. Hudson*, 447 U.S. at 564. *See also Educ. Media Co. at Va. Tech v. Swecker*, 602 F.3d 583, 587 (4th Cir. 2010) (observing *Central Hudson* applies to both facial and as-applied challenges). Specifically, the court must examine whether (1) the regulated speech concerns lawful activity and is not misleading; (2) the regulation is supported by a substantial government interest; (3) the regulation directly advances that interest; and (4) the regulation is not more extensive than necessary to serve the government’s interest. *Cent. Hudson*, 447 U.S. at 566. If these criteria are met then the challenged regulations must stand.

Plaintiffs’ facial and as-applied challenges to Virginia’s happy hour restrictions raise different considerations. To prevail under a facial challenge, a plaintiff must either “demonstrate ‘that no set of circumstances exists under which the law would be valid, or that the law lacks any plainly legitimate sweep[,]’” or “show that the law is ‘overbroad because a substantial number of

its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep[.]” *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor and City Council of Balt.*, 721 F.3d 264, 282 (4th Cir. 2003) (en banc) (alterations omitted) (quoting *United States v. Stevens*, 559 U.S. 460, 472-73 (2010)). “Under either scenario, a court considering a facial challenge is to assess the constitutionality of the challenged law ‘without regard to its impact on the plaintiff asserting the facial challenge.’” *Insley*, 731 F.3d at 298 n.5 (quoting *Swecker*, 602 F.3d at 588). As-applied challenges, in contrast, are “based on a developed factual record and application of a statute to a specific person[.]” *Richmond Med. Ctr. for Women v. Herring*, 570 F.3d 165, 172 (4th Cir. 2009) (en banc).

a. The Regulations Relate To A Substantial Government Interest.

Virginia has a substantial interest in regulating alcohol sales and curbing overconsumption in happy-hour settings. *See Brooks v. Vassar*, 462 F.3d 341, 351 (4th Cir. 2006) (“The Twenty-first Amendment was designed to protect certain core interests of the States in promoting temperance, ensuring orderly market conditions, and raising revenue through regulation of the manufacture, distribution, and sale of alcoholic beverages.”) (internal quotations and citation omitted). When evaluating the state’s interest in commercial-speech cases, the Fourth Circuit has instructed district courts to avoid considering “the state interests as distinct purposes when in fact they are an interrelated whole.” *WV Ass’n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 302 (4th Cir. 2009).

In *Musgrave*, the Fourth Circuit considered whether, after examining the state-run lottery system, West Virginia’s restrictions on lottery advertising violated the First Amendment. *Id.* at 294. The court first reasoned that “[t]he state’s interest in conducting the lottery [fell] squarely within the state’s historic interest in regulating gambling pursuant to the state police power.” *Id.*

at 302. And it mattered that West Virginia decided to “permit only lotteries that [were] regulated, controlled, owned and operated by the State of West Virginia in the manner provided by general law.” *Id.* at 303. Because West Virginia found it beneficial to balance the need to generate revenue against the negative effects of gambling, the state sought “to have the best of both worlds by limiting the scope of the lottery through a licensing scheme” that included various advertising regulations. *Id.* The court therefore found that the regulations served the “perfectly coherent goal of creating a lottery that raises revenue without preying on the vulnerabilities of the impecunious and those prone to gambling addictions.” *Id.* at 302. As a result, West Virginia had a substantial interest in seeking to raise revenue but not in a manner that exacerbated social problems associated with gambling. *Id.*

West Virginia’s interest in its state-run lottery system mirrors Virginia’s interest in its state-run alcohol system. *See also Anheuser-Busch, Inc.*, 26 S.E.2d at 96 (alcohol is a business affected with public interest). The General Assembly determined that regulating alcohol is an important interest for the Commonwealth.¹⁰ To that end, the legislature tasked ABC with regulating the alcohol industry and generating “a reliable stream of revenue for Virginia” while promoting “public safety through the responsible sale and regulation of alcoholic beverages.” (SOF ¶ 3.) “ABC has contributed more than \$9.9 billion to the general fund since 1934 to support state services, including substance abuse and treatment.” (SOF ¶ 4.) As a result, “the government interest is stronger here, and the private interest is weaker, than in typical commercial speech cases because the state” regulates alcohol sales and returns revenue from the

¹⁰ Before 1971, the Virginia Constitution enshrined the General Assembly’s authority to regulate intoxicating liquors. *See Commonwealth v. Anheuser-Busch, Inc.*, 26 S.E.2d 94 (Va. 1943) (applying Art. IV, Sec. 62). Because the Commonwealth has consistently preserved alcohol regulation within its Constitution and statutes, the Commonwealth’s interest in regulating alcohol sales and consumption is substantial.

sales to the state’s general fund. *Musgrave*, 553 F.3d at 306 (finding substantial government interest in state-owned lottery system).

Furthermore, as a control state, the Commonwealth regulates the possession, sale, transportation, distribution, and delivery of alcoholic beverages using a licensing scheme that includes various advertising regulations. (SOF ¶¶ 1, 2, 10.) And, like gambling, the negative effects of alcohol consumption underscore the need for the regulations. *See Dickerson v. Commonwealth*, 24 S.E.2d 550, 554 (Va. 1943), *aff’d sub nom. Carter v. Virginia*, 321 U.S. 131 (1944) (“Because of the recognized evils attendant upon the [liquor] traffic it has been held to be subject to the police power of the State, in the interest of the safety, health, and well-being of the local communities.”). After examining ABC’s role within the Commonwealth, its directive, and its regulatory framework as whole, it is clear that the regulations at issue relate directly to curbing overconsumption at a happy-hour setting, a quintessential government interest.

Indeed, the Commonwealth has valid public health concerns, as alcohol plays a major role in causing disability, disease, and fatal injuries. (SOF ¶ 5.) As a commodity, alcohol implicates public-health concerns because it has direct and indirect effects on a wide range of body organs and systems. (SOF ¶ 5.) States routinely regulate commercial speech in the interests of public health when products, such as alcohol, tobacco, food, and, more recently, marijuana, are ingested or consumed. *See Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2014) (meat labels must disclose country-of-origin); Leslie Gielow Jacobs, *Regulating Marijuana Advertising and Marketing to Promote Public Health: Navigating the Constitutional Minefield*, 21 Lewis & Clark L. Rev. 1081, 1083 (2017) (legalizing marijuana “also injects the potent tool of advertising and marketing to promote marijuana into the struggle for persuasive

influence between sellers aimed at increasing profits and regulators trying to minimize the damages to public health”).

Interestingly, Plaintiffs do not allege in their complaint that Virginia’s interest in discouraging the overconsumption of alcohol is less than substantial. Indeed, given the significant negative societal impacts that result from over consuming alcohol, it would be nearly impossible for the Plaintiffs to dispute the substantiality of Virginia’s interest here.¹¹ This is especially true where, when considering a state regulation governing beer labels, the Supreme Court recognized that “the Government [] has a significant interest in protecting the health, safety, and welfare of its citizens by preventing brewers from competing on the basis of alcohol strength, which could lead to greater alcoholism and its attendant social costs.” *Rubin*, 514 U.S. at 485. Thus, there is a substantial government interest in limiting promotions associated with discounted alcoholic beverages during happy hour, which may result in binge drinking, drinking and driving, and other harmful personal and public health consequences. Accordingly, the second prong of *Central Hudson* is met.

b. The Advertising Restrictions Directly Advance The State’s Interest.

The advertising restrictions must directly and materially advance the asserted governmental interest. “This relationship, or link, need not be proven by empirical evidence; rather, it may be supported by history, consensus, and simple commonsense. However, the link is insufficient if it is irrational, contrary to specific data, or rooted in speculation or conjecture.” *Swecker*, 602 F.3d at 589 (internal quotations and citations omitted); *see also Fla. Bar.*, 515 U.S.

¹¹ Furthermore, when examining other alcohol-related restrictions on speech, the Fourth Circuit has readily found that the Commonwealth pronounced a substantial governmental interest. *See Insley*, 731 F.3d at 299 (“Virginia’s stated interest in combatting underage and abusive drinking on college campuses represents a substantial governmental interest”); *Swecker*, 602 F.3d at 589 (Virginia validly asserted “a substantial interest in combating the serious problem of underage drinking and abusive drinking by college students”).

at 628 (litigants may justify commercial speech restrictions by referring “to studies and anecdotes pertaining to different locales altogether”).¹²

i. History, Commonsense, and Empirical Evidence Support the Link.

Throughout its history, Virginia has sought to curb the negative effects of alcohol consumption, particularly overconsumption. *See Anheuser-Busch, Inc.*, 26 S.E.2d at 96 (upholding advertising restrictions where ABC sought to “discourage the artificial stimulation of liquor consumption”). As part of this goal, ABC has consistently employed advertising restrictions to directly and materially advance the Commonwealth’s interest in moderating alcohol consumption during happy hours. Absent such regulations, unlimited happy-hour advertising poses the risk of spreading the negative effects of alcohol throughout the Commonwealth.

Similarly, commonsense informs us that enticing people to consume discounted alcoholic beverages in a limited timeframe puts the individual at risk and, if the individual subsequently drives or engages in other unsafe behavior, it puts others at risk as well. Indeed, the Fourth Circuit relied on commonsense and intuition when determining that a ban on advertising alcohol in college-student publications directly advanced the Commonwealth’s interest in curbing underage drinking and abusive drinking by college students. *Swecker*, 602 F.3d at 590 (“It is counterintuitive for alcohol vendors to spend their money on advertisements in newspapers with relatively limited circulation, directed primarily at college students, if they believed that these ads would not increase demand by college students.”). Plaintiffs also concede that discounted alcoholic beverages are enticing to a price-sensitive population. (SOF ¶ 7.)

¹² The distinction between a facial challenge and an as-applied challenge is immaterial when considering this prong. *See Insley*, 731 F.3d at 300.

Here, the challenged regulations directly advance the government’s interest in limiting the promotion of such activity: that is, the regulations constrain how licensees may market their happy-hour specials so as not to “unduly encourage” overconsumption. *Anheuser-Busch, Inc.*, 26 S.E.2d at 96 (Virginia reasonably restricted certain advertisements to not “unduly encourage” liquor consumption). The advertising restrictions serve the Commonwealth’s interest by reducing demand for cheap or unlimited alcohol in retail establishments. And Plaintiffs’ complaint focuses almost exclusively on the alleged business impact of the challenged regulation,¹³ which highlights the clear relationship between Virginia’s interest and the challenged advertising restrictions. “Of course this makes perfect sense. If advertising did not increase demand, commercial establishments would be loathe to pay for it.” *Musgrave*, 553 F.3d at 304. See Jacobs, *Regulating Marijuana Advertising and Marketing to Promote Public Health: Navigating the Constitutional Minefield*, 21 Lewis & Clark L. Rev. at 1087 (“yearly alcohol advertising expenditures in the United States in ‘measured media’ are over \$2 billion”); see also Daniel J. Croxall, *Cheers to Central Hudson: How Traditional Intermediate Scrutiny Helps Keep Independent Craft Beer Viable*, 113 Nw. U.L. Rev. Online 1, 20 (2018) (reviewing studies showing certain advertising forms have enormous impacts on consumers). The seminal case on commercial speech makes this point clear. *Cent. Hudson*, 447 U.S. at 569 (“There is an immediate connection between advertising and demand for electricity.”). The happy hour restrictions are therefore designed to keep demand at a level that raises revenue, but does not magnify the more negative effects of increased drinking.

¹³ For example, Plaintiffs claim that “[o]ne of the ways in which Chef Geoff tries to beat the competition and attract new customers is by offering happy hour specials in a town well-known for its love of happy hour.” (Dkt. No. 9, ¶ 3.) Plaintiffs further assert that “[t]o attract customers to the restaurant, Chef Geoff advertises his happy hour specials. Competition is rampant in the restaurant industry, and one way to gain an advantage is to compete based on price.” *Id.*, ¶ 14.

Additionally, empirical evidence establishes that advertising happy-hour drink prices results in increased on-premises drinking within a short period of time. As Dr. Reed shows through his work, alcohol consumption is price-sensitive. As a result, happy hour pricing has a significant impact on the level of alcohol consumption, (SOF ¶ 29), and regulating how pricing information is disseminated is directly linked to ABC's interests in curbing overconsumption in a happy-hour setting. Relatedly, the regulations prevent licensees from competing against each other and racing to the bottom to offer the cheapest alcohol. (SOF ¶ 12.) Empirical evidence also shows that BOGO sales result in significantly more alcohol consumption,¹⁴ as do bottomless beverage offers and "all you can drink" for a set price. (SOF ¶ 32.) The challenged regulations are thus directly linked to a legitimate state purpose; preventing consumers from overindulging discounted alcoholic beverages in a happy hour setting.

ii. Plaintiffs' expert studied irrelevant off-premises alcohol consumption

Plaintiffs' purported rebuttal expert, Dr. Jon Nelson, broadly studies alcohol advertising bans and general alcohol demand. His studies focus on off-premises alcohol consumption, *i.e.*, drinking that occurs outside of a happy hour setting. Nelson's studies are simply irrelevant to this case. Nelson focused his work on state-level panel data on alcohol consumption and state regulatory policies, which Reed did not discuss. Nor did Nelson address how promotional framing (BOGO sales) impacts alcohol consumption during happy hours. In so doing, Nelson

¹⁴ Although Plaintiffs suggest that there is no difference between a "two for one" deal and "half off," (Dkt. No. 9. ¶¶ 44-48), there is a distinction regarding consumer behavior and marginal price. The marginal price (should I buy another?) for every drink is positive when drinks are half off. The marginal price for even numbered drinks is zero when you advertise "two for one." From a decision-making perspective, those are very different results unless each consumer buys an even number of drinks. Indeed, this is why BOGO sales are prolific throughout the marketing industry. If such sales did not have desirable consumer affects, then retailers would not use them. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 545 (2001) (noting cigarette industry used point-of-sale and BOGO promotions). In any event, the regulation prohibiting bundled discounts applies to conduct, not speech.

merely addresses the same general subject matter of the case, alcohol, but he does not address the same subject matter of Reed's report, happy hours.

The data on which Nelson relied in his studies further demonstrate the limitations of his report. Nelson employed the alcohol price series of the American Chamber of Commerce Researchers Association (ACCRA) to conduct his work. Critically, this data series contained only information on alcohol—namely 6-packs of Heineken and 1.5 liter bottles of white table wine—that consumers intended to serve in their home.¹⁵

Even so, Nelson previously determined that banning price advertisements resulted in decreased off-premises alcohol consumption, which supports Defendants' position. His research showed that "total alcohol demand is . . . negatively affected by bans of price advertising." (Zurawski Decl., ¶ 11, Ex. J at Ex. 3 at 13.) And "[a]t the beverage level, the demands for spirits and wine are . . . negatively affected by bans of price advertising." (*Id.*) Similarly, Nelson determined that alcohol price resulted in a negative coefficient. (*Id.* at Ex. 1 at 91.) It follows that banning discounted price advertisements related to happy hours likewise decreases on-premises alcohol consumption.

In sum, the advertising regulations plainly advance a government interest; namely, avoiding the overconsumption of alcohol within a short period of time. Thus, the challenged regulations are far from irrational. *Cf. Rubin.*, 514 U.S. at 488 (speech restriction did not

¹⁵ See Cost of Living Index Manual (formerly ACCRA) <http://coli.org/wp-content/uploads/2016/06/2016-COLI-Manual.pdf>. (last visited Dec. 17, 2018). ACCRA specifically directed its researchers to collect "the average price for a six-pack of Heineken's beer in 12-ounce containers. Exclude deposit, if any. Do not price 12-packs or cases and then report a prorated price. Wine: Report the average price for a 1.5-liter bottle of white table wine. It may be pinot grigio, Chablis blanc, or other white table wine of your choice. The basic rule of thumb for this items is, 'Would you serve it in your home?' Price only blends—don't price vintage years, which are more expensive."). (See Zurawski Decl. ¶ 11, Ex. J.)

“directly and materially advance its asserted interest because of the overall irrationality of the Government’s regulatory scheme”). And there is scant evidence that attempts to negate the linkage between advertising drink specials and overconsumption. *Cf. 44 Liquormart Inc v. Rhode Island*, 517 U.S. 484, 506 n.17 (1996) (observing that price advertising ban would have marginal impact on *overall* alcohol consumption). Because “[h]appy hours, drinking contests, ‘all you can drink specials,’ and the like encourage over-consumption by reducing prices, a potent inducement to drinking large amounts of alcohol in short time period,” (Curtis Decl., ¶ 9 Ex. F at 3.) ABC enacted regulations to limit advertisements specifically related to these settings. Through a comprehensive regulatory scheme that ABC adopted with the public’s health, safety, welfare in mind, ABC directly advanced the Commonwealth’s interest in the safe and legal consumption of discounted alcoholic beverages by imposing certain happy-hour advertising restrictions. As a result, the third prong of *Central Hudson* is satisfied.

c. The happy hour regulations are narrowly tailored

The final prong of *Central Hudson* focuses on whether the regulation is narrowly drawn. 447 U.S. at 565-66.¹⁶ To satisfy this prong, “[t]he restrictions do not need to be the least restrictive means possible, but they do need to have a ‘reasonable fit with the government’s interest—a fit that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.’” *Swecker*, 602 F.3d at 590 (internal quotations and citations omitted). This prong does not ask the Court to determine whether there are hypothetical ways to make the regulations better. “A judge would be unimaginative indeed if he could not come up with something a little less ‘drastic’ or a little less ‘restrictive’ in almost any situation, and thereby enable himself to vote to strike legislation down.” *Ill. State Bd. of Elections v. Socialist*

¹⁶ Under this prong the Court must consider “the application of the challenged regulation to these specific plaintiffs” for the as-applied challenge. *Insley*, 731 F.3d at 301.

Workers Party, 440 U.S. 173, 188–89 (1979) (Blackmun, J., concurring). Rather, “if the Government could achieve its interest in a manner that does not restrict speech, or that restricts less speech, the Government must do so.” *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371 (2002). Defendants, however, are not required to show “the manner of restriction is absolutely the least severe that will achieve the desired end.” *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). The Supreme Court therefore left discretion for “governmental decisionmakers to judge what manner of regulation may best be employed.” *Id.*

Here, the regulations are narrowly tailored to serve ABC’s interest in establishing a comprehensive regulatory and licensing scheme that tempers the consumption of discounted alcoholic beverages in a happy-hour setting. First, unlike other commercial speech cases, the regulations at issue do not sweep broadly and ban all advertising related to happy hours or drink prices. *Cf. Sorrell*, 564 U.S. at 557 (state statute unconstitutionally prohibited the sale, disclosure, and use of pharmacy records that revealed prescribing practices of doctors); *Thompson*, 535 U.S. at 360 (federal statute unconstitutionally prohibited advertising and promoting compounded drugs); *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 177 (1999) (federal statute unconstitutionally banned radio and television broadcasting of “any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance”); *44 Liquormart*, 517 U.S. at 489 (state statute unconstitutionally prohibited advertisements about alcoholic beverage retail prices); *Edenfield*, 507 U.S. at 764 (state statute unconstitutionally prohibited “any direct, in-person, uninvited solicitation solicit an engagement to perform public accounting services”); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 412 (1993) (city regulation unconstitutionally banned news racks from public property); *Peel v. Attorney Registration &*

Disciplinary Comm’n of Ill., 496 U.S. 91, 110 n.17 (1990) (holding total ban unconstitutional but that did not “preclude less restrictive regulation of commercial speech”); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 750 (1976) (state statute unconstitutionally banned advertising or promoting “in any manner whatsoever, any amount price, fee, premium, discount, rebate or credit terms . . . for any drugs which may be dispensed only by prescription”).

Rather, the regulations allow licensees, such as Plaintiffs, to advertise customary prices and drink information and merely restrict certain information regarding discounts. *See, e.g., Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 329 (4th Cir. 1996) (upholding advertising restrictions where city did not ban “outdoor advertising of alcoholic beverages outright”). To be sure, licensees may promote the time span of their happy hour and may list specific drink types and brands. (SOF ¶ 23.) Licensees may promote drink specials on flyers, posters, social media, their websites, billboards, radio stations, in digital advertisements online, on television, and through other paid advertising. Licensees may also post a sign in the window with happy hour information and tell customers about happy hour specials over the phone. (SOF ¶ 22.) Additionally, licensees may advertise certain food and drink combinations, such as “20 wings and pitcher of Bud Light for \$15.99 from 5-7 p.m.” (SOF ¶ 21.) Moreover, licensees may advertise a specific alcoholic beverage and its price as long as the price is always the same and manufacturer or wholesaler money is not involved in the drink promotion – *e.g.*, “Introducing our new drink, The Pilot, featuring Bacardi Limon rum. Only \$7.”¹⁷ (SOF ¶ 20.) And the

¹⁷ For the same reasons, this case is readily distinguished from *Insley*. 731 F.3d 291. There, ABC limited alcohol advertising in college student newspapers. The Fourth Circuit held that ABC did not appropriately tailor its advertising ban to Virginia’s stated aim. *Id.* at 302 (regulations cannot keep would-be drinkers wholly in the dark). That is not the case here, where

regulations do not restrict how Plaintiffs or other licensees may advertise on unpaid options such as social media or within a licensed establishment. (SOF ¶ 18.)

And though Plaintiffs complain that they cannot use “festive” descriptors to advertise their drink specials, like “Wednesday Wine Night” (Dkt. No. 9 ¶ 3), such language consists only of noninformational advertising and does not convey objectively verifiable information to consumers. *Cf. 44 Liquormart, Inc.*, 517 U.S. at 502 (striking down regulations that targeted objectively verifiable information). *See also* Micah L. Berman, *Manipulative Marketing and the First Amendment*, 103 Geo. L.J. 497, 514 (2015) (“Noninformational advertising—for example, the use of cartoon characters to promote children’s cereals—is pure persuasion that in no way helps consumers to make better informed choices.”).

Second, the advertising restrictions are narrowly tailored because ABC has both considered and implemented other non-speech mechanisms aimed at the same public health, safety, and welfare. *Swecker*, 602 F.3d at 590-91 (considering non-speech alternatives to satisfy fourth prong). For example, the challenged regulations restrict the discounts licensees may offer, such as two-for one drink specials or furnishing free drinks. (SOF ¶ 26.) Similarly, licensees may not serve customers who already have two drinks in front of them at any one given time during happy hour, with the exception of small flights of beer or wine. (SOF ¶ 10.) Relatedly, licensees may not compensate restaurant employees based on the volume of alcohol sold. (SOF ¶ 10.) ABC also specifies the selection of food that must be available to customers when selling alcohol and sets a food-alcohol sales ratio for licensees. (SOF ¶ 10.) The advertising restrictions merely complement these non-speech initiatives by limiting how licensees publicize happy hours in ways that lead to overconsumption in a happy hour setting.

ABC allows licensees to disseminate information about happy hours through any medium to the general public and consumers are not kept in the dark about drink specials.

More generally, as a control state, ABC maintains a product and price list for liquor sold in Virginia, all of which passes through a warehouse located in Richmond, Virginia. *Cf. 44 Liquormart, Inc.*, 517 U.S. at 507 (Stevens, J., concurring) (noting state could directly regulate alcohol prices through establishing minimal prices or increasing taxation rather than price advertising ban). The revenue ABC earns is transferred to Virginia’s general fund. (SOF ¶ 4.) ABC also regulates and approves the content and labels for spirits, wine, and beer. (SOF ¶ 10.) To further its mission, ABC implemented enforcement programs. (SOF ¶ 10.)

The Commonwealth has even gone beyond conducting an educational campaign as suggested in *44 Liquormart*, 517 U.S. at 507 (Stevens, J., concurring), by enacting youth prevention programming, the Higher Education Alcohol and Drug Strategic Unified Prevention (HEADS UP) program, adult education and prevention programming, and alcohol seller, server, and manager training, and participates in the Virginia Office for Substance Abuse Prevention. (SOF ¶ 10.) The Commonwealth also limited alcohol advertising near schools and playgrounds. Va. Code Ann. § 4.1-112.2 (advertising limitations). The Commonwealth has taken advantage of virtually all of the nonspeech alternatives suggested in other cases. *Cf. Greater New Orleans Broad. Ass’n*, 527 U.S. at 192 (noting the need for “practical and nonspeech-related forms of [gambling] regulation,” including licensing requirements, restricting gambling locations and casino admissions, and limiting betting amounts). The Commonwealth has thus not only considered, but has implemented regulations that are alternatives to regulations on speech. But ABC concluded that its objectives would be compromised if advertising for discounted alcoholic beverages during happy hour contradicted, rather than supplemented, its conduct restrictions, substance abuse, and educational initiatives.

ABC's advertising regulations are an integral, reasonable fit to serve the substantial governmental interest present here. The possible existence of more effective methods does not undermine the happy-hour regulations, particularly in light of ABC's overarching mission to generate revenue while balancing public health, safety, and welfare. While Plaintiffs may seek to return "to the bygone era of *Lochner v. New York*, 198 U.S. 45 (1905), in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies," *Cent. Hudson*, 447 U.S. at 589 (1980) (Rehnquist, J., dissenting), this Court should not subvert the role of the legislature.¹⁸ ABC has developed a reasonable and comprehensive scheme to achieve its mission, which includes only a marginal restriction on speech related to discounted alcoholic beverages. As a result, the regulations are narrowly drawn and the fourth prong of *Central Hudson* is met.

CONCLUSION

For the foregoing reasons, this Court should enter summary judgment in favor of Defendants' and order any other appropriate relief.

¹⁸ ABC's strategy in combating overconsumption has evolved over time to take into account changing societal attitudes towards alcohol, practical business considerations (including input from licensees), and public health, safety, and welfare concerns. Input from licensees is always helpful for evaluating the effectiveness and reach of ABC's regulations. Therefore ABC attempted to communicate with Plaintiffs about its concerns with the regulations at issue. While ABC understands that Plaintiffs may disagree with the regulations, changing the regulatory framework is a legislative process, involving public hearings, comment periods, and debate. Plaintiffs are trying to bypass this process through this litigation. Contrary to Plaintiffs' claims in the press, ABC remains committed to serving its constituencies, which requires balancing multiple interests, and is not "drunk with power." (Zurawski Decl. ¶ 12, Ex. K.)

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CERTIFICATE OF SERVICE

I certify that on this 17th day of December, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, and that a Notice of Electronic Filing (NEF) was sent to all counsel of record.

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